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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LEONARDO GUERRERO,

Defendant and Appellant.

D052962

(Super. Ct. No. SCN242150)

APPEAL from a judgment of the Superior Court of San Diego County, Daniel B. Goldstein, Judge. Affirmed.

Leonardo Guerrero entered negotiated guilty pleas to resisting an executive officer (Pen. Code,¹ § 69) and possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). As part of the plea agreement, Guerrero also admitted he had a prior serious/violent felony or strike conviction (§ 667, subds. (b)-(i)) and had served a prior prison term within the meaning of section 667.5, subdivision (b). The plea bargain provided that the balance of the information be dismissed and called for a stipulated

sentence of eight years four months in prison. The trial court sentenced Guerrero in accordance with the plea bargain.

Guerrero obtained a certificate of probable cause.

FACTS

At 9:45 p.m., on February 27, 2008, Escondido Police Officer Robert Craig and his partner went to the 1500 block of Orange Place in response to a dispatch call that a person was selling narcotics on the street. Upon the officers' arrival, they made contact with Guerrero and asked him to stop walking. Guerrero complied. Craig's partner asked Guerrero if he had any weapons. Guerrero put his hands in his pockets and said he did not have any weapons. Craig's partner instructed Guerrero to take his hands out of his pockets and told Guerrero that he was going to pat him down. Guerrero raised his hands horizontally at his sides and replied: "Go ahead." Craig testified at the preliminary hearing that in his experience as a police officer, people selling drugs are frequently armed. Craig also noted that Guerrero was wearing baggy clothing. The officers wanted to conduct a pat down so they could conduct their investigation safely, Craig said.

Craig stood behind Guerrero and twice told him to put his hands behind his back. Guerrero did not comply. Craig tried to grab Guerrero's hands and position them behind his back, but Guerrero pulled away from Craig and ran. The officers chased Guerrero. The officers repeatedly shouted at Guerrero to stop.

When Craig caught up with Guerrero, he escaped after throwing a couple of punches at the officer. Later, Guerrero picked up a bamboo pole, which had a plastic

¹ Statutory references are to the Penal Code unless otherwise specified.

solar light panel at one end, and swung it at Craig. As Craig jumped back, Guerrero dropped the pole and attempted to climb a wall. Craig stopped Guerrero by shooting his taser gun at Guerrero, who was then arrested.

Police found .26 grams of methamphetamine in Guerrero's clothes.

DISCUSSION

Appointed appellate counsel has filed a brief setting forth evidence in the superior court. Counsel presents no argument for reversal, but asks this court to review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436. Pursuant to *Anders v. California* (1967) 386 U.S. 738, counsel refers to as a possible, but not arguable, issue: whether Guerrero received ineffective assistance of counsel because a motion to suppress evidence was not filed on his behalf.

We granted Guerrero permission to file a brief on his own behalf. He has responded. Guerrero contends his guilty pleas were coerced by the trial court's impatience during the change of plea hearing. Furthermore, Guerrero claims he received ineffective assistance of counsel. Neither contention has merit.

As to the first issue, the record shows the trial court asked Guerrero if he had any questions regarding the plea bargain and Guerrero replied that he was not clear about whether he would be required to serve 80 percent of the sentence.² After it was indicated

² Guerrero obviously was referring to the so-called "80 percent rule" of the "Three Strikes" law, which mandates that when a defendant is found guilty of a felony and has a prior serious/violent felony or strike conviction, he or she must serve 80 percent of the sentence for the current offense before being placed on parole. Section 667, subdivision (c)(5) provides that when a defendant is sentenced under the three strikes law, "[t]he total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of

to Guerrero that the 80 percent rule would apply, the court asked Guerrero if he wanted to change his mind and not proceed with the plea bargain. The following colloquy then took place:

"THE DEFENDANT: Oh, I'll take it.

"THE COURT: Well, I want you to want it though[,] right. You want to do this deal or not?

"THE DEFENDANT: Yeah, I'm going to take it.

"THE COURT: Okay. . . ."

After stating the terms of the plea bargain, the court asked Guerrero if he was pleading guilty freely and voluntarily. Guerrero replied that he was. The court went over the constitutional rights that Guerrero was giving up by pleading guilty and asked whether he waived those rights. Guerrero replied in the affirmative.

After Guerrero pleaded guilty to the two counts and admitted he had a prior strike conviction, the court found Guerrero had knowingly, intelligently and voluntarily entered his pleas and waived his rights. At that point, the prosecutor pointed out that the plea bargain called for an admission of the prior prison term as well. The following colloquy took place:

"THE COURT: . . . And, sir, do you want to admit you suffered a prior prison commitment . . . ? Do you want to admit that?

"THE DEFENDANT: Didn't I admit that.

Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison."

"THE COURT: You admitted the strike prior, you also have a prison prior. So for me to get to eight years four months you're going to have to admit that.

"THE DEFENDANT: So that's another three years?

"[DEFENSE COUNSEL]: No.³

"THE COURT: If you want the eight years--you know what. I want to tell you something right now, I don't want to mess around here. Okay? This isn't fun time. The People are being very kind to you right now. It can easily turn into 15 years in a heart beat. Do you want to admit the prison prior or not?⁴

"THE DEFENDANT: Yes.

[¶] . . . [¶]

"THE COURT: All right. All right. I'll make findings defendant's making knowing, intelligent, voluntary waivers as to the prior also."

The record establishes Guerrero's pleas complied with the mandates of *In re Tahl* (1969)

1 Cal.3d 122 and *Boykin v. Alabama* (1969) 395 U.S. 238.

We reject Guerrero's claim that he was coerced into pleading guilty. The court gave Guerrero an opportunity to change his mind about pleading guilty when the issue of the "80 percent rule" arose. Later, when Guerrero displayed reluctance to admit to the prior prison term allegation, the court again gave him the opportunity to back out of the plea agreement. We do not view the court's reminder to Guerrero that he ran the risk of a much greater sentence if he did not take the plea bargain to be coercive.

³ The prior prison term enhancement was one year. (§ 667.5, subd. (b).)

⁴ Guerrero claims the court reporter made a mistake in reporting 15 years rather than 13 years—that is, the court said 13 years. Guerrero has not substantiated this claim.

Guerrero has not specified which part of trial counsel's performance he deems ineffective. For sake of argument, we assume he is referring to counsel's conduct at the change of plea hearing and/or counsel's failure to file a suppression motion.

To establish ineffective assistance of counsel, Guerrero must show (1) counsel failed to act in a manner to be expected of a reasonably competent attorney, and (2) counsel's acts or omissions prejudiced him. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692.)

Trial counsel did not render ineffective assistance of counsel at the change of plea hearing. Counsel successfully negotiated a plea bargain that was advantageous to Guerrero—that is, a sentence considerably less than his maximum exposure. Guerrero was sentenced in accordance with the plea bargain. To the extent Guerrero claims that counsel should not have allowed the court to coerce him to accept the plea bargain, the claim fails because he has not shown judicial coercion.

Counsel also did not provide ineffective assistance by failing to file a suppression motion. Counsel does not render ineffective assistance by failing to make motions that would be futile. (*People v. Price* (1991) 1 Cal.4th 324, 387.)

In *Terry v. Ohio* (1968) 392 U.S. 1, 21, the United States Supreme Court held that even though a police officer may lack probable cause to arrest, he may detain and question a person on the street if the officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." (*Ibid.*, fn. omitted.) "The specific and articulable facts must cause the police officer to suspect that some activity relating to crime has taken place or is

occurring or about to occur, and the person he intends to stop or detain is involved in that activity." (*People v. Brown* (1985) 169 Cal.App.3d 159, 163.) "Not only must he subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so; the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience, [citation] to suspect the same criminal activity and the same involvement by the person in question." (*In re Tony C.* (1978) 21 Cal.3d 888, 893, fn. omitted.)

Officer Craig and his partner responded to a dispatch call regarding a person selling narcotics on the 1500 block of Orange Place, where they observed Guerrero walking. Thus, the officers were aware of criminal activity that had taken place. It was reasonable for the officers to approach Guerrero, ask him to stop and make an inquiry. The detention was lawful.

Under *Terry v. Ohio*, *supra*, 392 U.S. at page 24, a police officer must reasonably conclude that the person he has legitimately stopped might be armed and presently dangerous in order to legally conduct a pat down search. Here, Craig and his partner wanted to conduct a pat down so they could conduct their investigation safely. In his experience as a police officer, Craig found people selling drugs are frequently armed. Craig also noted that Guerrero was wearing baggy clothing. The officers were justified in conducting a pat down search of Guerrero.

A suppression motion under section 1538.5 would not have been successful. Accordingly, counsel's failure to file such a motion did not constitute ineffective assistance of counsel. (*People v. Price*, *supra*, 1 Cal.4th at p. 387.)

A review of the record pursuant to *People v. Wende*, *supra*, 25 Cal.3d 436 and *Anders v. California*, *supra*, 386 U.S. 738, including the possible issue referred to by appellate counsel, has disclosed no reasonably arguable appellate issues. Competent counsel has represented Guerrero on this appeal.

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

McINTYRE, J.

IRION, J.